



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable Alex Jung  
County Attorney  
Gillespie County  
Fredericksburg, Texas

Dear Sir:

Opinion No. 0-4126

Re: Under the facts set forth  
is it permissible to try  
the case before some per-  
son agreed upon between  
the county attorney and  
the defendant or his at-  
torney? And related ques-  
tions.

Your request for our opinion on the hereinabove cap-  
tioned questions has been received by this department. We  
quote from your letter as follows:

"Lee Its, a resident citizen of Gillespie  
County, Texas, but residing outside of the  
limits of Justice Precinct No. 1 and also out-  
side of the corporate limits of the City of  
Fredericksburg, stands charged by complaint  
filed in the Justice Court of Precinct No. 1,  
of Gillespie County, Texas, with a game viola-  
tion which occurred outside of the limits of  
such city and precinct. The Justice of the  
Peace has signified his disqualification in  
this particular case on the ground of relation-  
ship within the prohibited degree. There are  
nine justice precincts in Gillespie County but  
there is no Justice of the Peace other than  
the one mentioned in such county, none other  
having been elected or appointed.

"\* \* \*.

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"QUESTIONS

"1. The quoted statutes being inadequate to deal with the situation presented under the foregoing facts, is it permissible to try the case before some person agreed upon between the County Attorney and the defendant or his attorney?

"2. In the absence of an agreement, who has the power and authority to appoint a special justice to try the cause?

"3. The Commissioners Court being possessed of the power to fill vacancies by appointment (Art. 2355), does such court also have the lesser power to appoint a special justice to try the particular cause?"

We note in your letter the statement that: "There are nine justice precincts in Gillespie County \* \* \*." We respectfully call your attention to Article V, Section 18 of the Texas Constitution which permits "not less than four and not more than eight," justice precincts.

Article 552 of Vernon's Annotated Code of Criminal Procedure reads as follows:

"Art. 552. (617) (606) Causes which dis-qualify

"No judge or justice of the peace shall sit in any case where he may be the party injured, or where he has been of counsel for the State or the accused, or where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree." (Underscoring ours)

Article 553 of said Code provides for the selection of a special district judge in the event the regular district judge is disqualified in a criminal case. Article 554 of said Code provides for a special county judge where the regular county judge is disqualified in a criminal case.

Article 558, Vernon's Annotated Code of Criminal Procedure, provides that:

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"Art. 558. (624) (611) Justice disqualified

"If a justice of the peace be disqualified from sitting in any criminal action pending before him, he shall transfer the same to the nearest justice of the peace of the county who is not disqualified to try it." (Underlining ours)

Article 2399, Vernon's Annotated Civil Statutes, provides for a special justice of the peace in civil cases only.

Where, as under the facts stated by you, there is only one justice of the peace in a county, and he is disqualified, we are unable to find any statutory authority for the selection or appointment of a special justice in a criminal case, either by agreement of the parties or otherwise.

Inasmuch as the Texas Constitution requires each county to be divided into justice court precincts, not less than four nor more than eight in number (Art. V, Sec. 18), it was no doubt anticipated by the Legislature that each county would have more than one justice of the peace and consequently a sufficient procedure provided for by Article 558, supra, where a justice of the peace is disqualified in a criminal case.

The fact that there is only one justice of the peace in the county, does not have the effect of authorizing the appointment of a special justice of the peace, either by agreement between the county attorney and defendant, or by the Commissioners Court or any one else. The only statutory authority for the trial in such a case is in accordance with the provisions of Article 558, supra. Judges can only be selected and commissioned to preside over a court as is provided by law and statutes providing for special judges must be strictly construed. Grogan vs. Robinson (Civ. App.), 8 S. W. (2d) 571, (error refused).

While Article 2355, Vernon's Annotated Civil Statutes, gives the Commissioners Court the power to fill a vacancy in the office of justice of the peace, it does not, in our opinion, give said court the power to appoint a special justice to try a particular case.

In view of the foregoing, we respectfully answer your three questions, under the facts stated, as follows:

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1. It is not permissible to try the case before some person agreed upon between the county attorney and the defendant or his attorney.

2. We have been unable to find any statutory or constitutional authority authorizing the appointment of a special justice to try the particular case mentioned, and, therefore, no one has the power or authority to make such appointment.

3. Although the Commissioners Court has the power, under Article 2355, Vernon's Annotated Civil Statutes, to fill vacancies in the office of justice of the peace, said Article does not confer on said court the power to appoint a special justice to try the particular case mentioned.

Thanking you for the able brief submitted by you,  
we are

Very truly yours

APPROVED OCT 27, 1947

ATTORNEY GENERAL OF TEXAS

*Gov. Allan*  
GOVERNOR

By

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EP:RS

